No. 09-1492

# IN THE
# SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

*Petitioner*,

v.

ROBERT R. BROOKS,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH F. YECKEL
*Counsel of Record*
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, MO 63119
(314) 227-2430
joe@yeckel-law.com

## QUESTION PRESENTED

Whether a criminal defendant who makes a non-substantive post-*Miranda* statement generally denying culpability was deprived of due process in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), where the prosecutor treated the statement as silence and repeatedly commented on, and adduced evidence of, that silence before the defendant invoked his right to remain silent.

TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... iv

JURISDICTION ..... iv

STATEMENT ..... 1

REASONS FOR DENYING THE WRIT ..... 12

CONCLUSION ..... 27

## TABLE OF AUTHORITIES

Cases

*Anderson v. Charles*, 447 U.S. 404 (1980) ..... 1, 16, 17, 18, 19, 26

*Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990) ..... 25

*Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) ..... 18

*Brecht v. Abrahamson*, 507 U.S. 619 (1993) ..... 19, 20, 21

*Doyle v. Ohio*, 426 U.S. 610 (1976) ..... 1, 16, 20

*Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323 (Fed. Cir. 2001) ..... 19

*People v. McReavy*, 462 N.W.2d 1 (Mich. 1990) ..... 22

*People v. Osband*, 919 P.2d 640 (Cal. 1996) ..... 23

*State v. Bell*, 931 A.2d 198 (Conn. 2007) ..... 22

*State v. Henry*, 863 P.2d 861 (Ariz. 1993) ..... 23

*State v. Mitchell*, 346 S.E.2d 458 (N.C. 1986) ..... 24

*State v. Parker*, 585 N.W.2d 398 (Minn. 1998) ..... 24

*United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993) ..... 26

*United States v. Caruto*, 532 F.3d 822 (9th Cir. 2008) ..... 25

*United States v. Hale*, 422 U.S. 171 (1975) ..... 1

*United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993) ..... 25, 26

*United States v. May*, 52 F.3d 885 (10th Cir. 1995) ..... 26

*United States v. Ochoa-Sanchez*, 676 F.2d 1283 (9th Cir. 1983) ..... 23

*Wade v. Commonwealth*, 724 S.W.2d 207 (Ky. 1986) ..... 24

## OPINIONS BELOW

The opinion of the Missouri Supreme Court (Pet. App. A1-A17) is reported at 304 S.W.3d 130. The opinion of the Missouri Court of Appeals (Pet. App. A18-A27) is not reported.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

## STATEMENT

In *Doyle v. Ohio*, the Court declared it "fundamentally unfair and a deprivation of due process" to allow the prosecution to impeach a defendant's testimony with post-*Miranda* silence. 426 U.S. 610, 618 (1976). The assurance implicit in the *Miranda* warnings—that "silence will carry no penalty"—served as the basis for the Court's ruling. *Id.* The Court concluded that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Id.* at 617. Consequently, the Court declared "it does not comport with due process to permit the prosecutor during the trial to call attention to [the defendant's] silence at the time of arrest and insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony." *Id.* at 619 (quoting *United States v. Hale*, 422 U.S. 171, 182-83 (1975) (White, J., concurring)).

Four years later, the Court held that *Doyle* does not apply to impeachment of a defendant's testimony with inconsistent post-*Miranda* statements. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). Allowing the prosecution to impeach a defendant in this manner does not violate due process, the Court explained, because "[a]s to the subject matter of those statements, the defendant has not remained silent at all." *Id.* But the Court cautioned that prosecutors who wish to inquire about post-*Miranda* statements must do so in a manner that does not emphasize the

defendant's silence. "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements" as long as the questions are "not designed to draw meaning from silence." *Id.*

In this case, the Missouri Supreme Court held that the prosecution repeatedly violated *Doyle* in all phases of the trial by treating Respondent Robert Brooks' post *Miranda* non-substantive statements as silence and emphasizing his failure to provide an exculpatory story after he had been Mirandized.

**A. Factual Background**

On August 29, 2006, Amanda Cates was shot and fatally wounded. Robert Brooks, her fiancé and a local police officer, was arrested for suspicion of homicide. Tr. 569, 591.

There were no independent eyewitnesses to the shooting. Tr. 534, 637. The petitioner and Mr. Brooks agreed that the gun went off during an argument between Mr. Brooks and Ms. Cates but offered different explanations for the shooting at trial.

The prosecution's theory was that Mr. Brooks intentionally shot Ms. Cates from a distance of several yards. Tr. 724. Mr. Brooks, on the other hand, claimed he acted in self-defense. Tr. 631. He maintained that Ms. Cates grabbed his gun during a heated argument, placed her finger on the trigger, and pointed the gun at him. Tr. 629-31. Mr. Brooks tried to disarm her, and they wrestled over the gun.

Tr. 630-32. The gun discharged during the struggle, and a bullet hit Ms. Cates. Tr. 632-33.

Police officers responding to an emergency call arrived around 12:30 a.m. Tr. 184, 196. They observed that Mr. Brooks was frantic, crying, and hysterical. Tr. 194, 213. Once the police had secured the scene, Mr. Brooks was transported to the police station for questioning. Tr. 528-29. After administering the *Miranda* warnings to Mr. Brooks, Lieutenant Thomas and Detective Pruneau interviewed Mr. Brooks to "try to get his side of the story." Tr. 529, 536, 570. The interview was video recorded, and the prosecution played twenty-six minutes of the recording at trial. Tr. 548-49; Exh. 64.

- **The Police Interrogate Mr. Brooks.**

At approximately 2:28 a.m., Lieutenant Thomas advised Mr. Brooks of his *Miranda* rights. Exh. 64. Lieutenant Thomas and Detective Pruneau repeatedly asked Mr. Brooks to tell them how the shooting occurred. Exh. 64; Tr. 555-67. Mr. Brooks did not answer these questions and did not offer his account of the shooting.

The portion of the interview played for the jury showed the following exchanges between the officers and Mr. Brooks:

> THOMAS: *Right now it wasn't not [sic] so much to ask you questions, as to [sic] your version what occurred.* I wasn't there, so I don't know.
>
> BROOKS: I don't know.

Tr. 555 (emphasis added).[1]

---

[1] As Mr. Brooks pointed out to the Missouri Supreme Court, portions of the interview were transcribed inaccurately. The recording of the interrogation established that Mr. Brooks did not say

* * *

PRUNEAU: If you have to walk out that door, but *I would sure like to hear your side of the story, you know.*
BROOKS: I asked you if I am free to go, yes or no?

Tr. 556 (emphasis added)

* * *

PRUNEAU: We don't—*we are not hearing your side, man.* Then I mean *if you are not hearing your side, put yourself in my situation okay?*
BROOKS: I have been there.

Tr. 557 (emphasis added)

* * *

PRUNEAU: *So what happened?*
BROOKS: Terry, Terry, it's not—there is nothing—I just—
THOMAS: You can make a phone call. We are not telling you can't make a phone call.
BROOKS: I can't call, I don't have no number. I don't know where it is. You got some water?

Tr. 559 (emphasis added)

* * *

---

"I don't know" when asked to explain what happened. According to the recording played in court, Mr. Brooks stated "I know," acknowledging his agreement that Lieutenant Thomas didn't witness the shooting:

THOMAS: Right now it wasn't so much to ask you questions as to [sic] your version of what occurred. [Inaudible] I wasn't there—
BROOKS: I know.
THOMAS: —So, I don't know.
BROOKS: Please give me a phone book. Please.

Exh. 64 (Timer 2:30:40 – 2:31:08).

THOMAS *Robert, I don't know what happened. All I want to do is find out what happened.* And you know as well as I do that when officers are first on the scene, they are coming in, they are getting their statements, you are giving a statement, we weren't there, you are upset, things were going on, so you have been doing this for years.

BROOKS I don't know why you are doing this.

THOMAS You have been doing this as a Detective. All we are trying to do is—

BROOKS I was going—the rest of my life with this. This is bullshit. Where is my daughter? Terry, where is [sic] my family members?

Tr. 560 (emphasis added).

* * *

PRUNEAU: . . . We need our time line, and *we need your story on what happened, okay? You've done this, you have done it for seventeen years. If you don't do anything, you know good and well that you can tell us what happened.*

BROOKS I don't know, man. I just—I am lost right now, brother.[4]

PRUNEAU: Well, I understand.

BROOKS I've lost everything.

Tr. 564 (emphasis added).

* * *

---

[4] The transcript does not accurately reproduce this exchange. According to the recording played for the jury, the exchange went as follows:

PRUNEAU We need *your* time line, and we need your story on what happened, okay? You've done this, you have done it for seventeen years. If you *didn't* do anything, you know good and well that you can tell us what happened.

BROOKS *[Inaudible]*. I just—I am lost right now, brother.

Exh. 64 (beginning at 21 minutes and 32 seconds into the recording or 2:44 a.m. according to the video timer) (emphasis added).

PRUNEAU: . . . . But here's the thing, Bob, and I keep saying this, I need, because I am—I am one of the investigators on here, okay? And you know this. You have been there. You have [done] it. ***You know how it goes. And you know—you know, whenever we talk to somebody and we hey listen, what is your side. And when we don't get cooperation—***[3]

BROOKS: I am not—I am just lost, man. I am just lost.

PRUNEAU: I understand you being lost, man, but I mean that's you being lost is not doing your daughter any good. Not doing you any good. Not doing us any good. ***I at least have to have somewhere to go and say hey, you know what, this is what he is saying happened.*** . . . [W]hen I get woke up at quarter to 1:00, there was an accidental shooting, up at Harbor Pointe, a guy accidentally shot his wife, thought it was an intruder, that's all I know. . . . ***So I mean it's going to be hard for me to defend you, being a police officer and saying hey, you know what he didn't cooperate, and he didn't tell me this. You know that. So I need to hear from you what happened.***. . . .

Tr. 566-67 (emphasis added).

During the interview, Mr. Brooks asked the officers if he was under arrest or free to go. Tr. 551, 556, 561. After being told he was free to go, Mr. Brooks decided to stay, stating: "I don't have nothing to hide. I didn't do nothing at all." Tr. 562. Twenty-six minutes into the interrogation, Mr. Brooks invoked his right to remain silent, and the officers stopped questioning him. Pet. 9 n.3; Tr. 163. Mr. Brooks did not discuss the shooting or inform the officers of the factual basis of the defense he would present at trial. Tr. 570-71; Exh. 64.

---

[3] The transcript omits the word "say" which is audible on the recording. Detective Pruneau said: "[Y]ou know, whenever we talk to somebody and we *say* hey listen, what is your side. And when we don't get cooperation—" Exh. 64 (beginning at 23 minutes and 34 seconds into the recording or 2:46:04 a.m. according to the video timer).

- **The Prosecutor Comments on, and Adduces Evidence Regarding, Mr. Brooks' Post-*Miranda* Refusal to Tell the Police his Version of the Shooting**

Throughout the trial, the prosecutor attacked Mr. Brooks' credibility and argued that he was culpable in the shooting due to his refusal to tell the officers how Ms. Cates was shot. In opening statement, the prosecutor accused Mr. Brooks of failing to cooperate with the police based on his refusal to provide his account of the shooting after he had been advised of his *Miranda* rights:

> And basically ***all they did was ask him what happened, what happened, Bob. He never would tell them. Not a word. Not a word.*** I need to talk to somebody is what he said, or I need a phone book. They gave him a phone book. Then he needs a phone number. They gave him a phone number. ***Then they say we want your side of the story,*** you are not under arrest, you are free to go, open the door and you are free to walk out of here. ***Over and over and over. You will see them ask him him [sic] and he just tells—they didn't interrogate him like they do most people, they said just tell us what happened. Not a word. Never told them that he thought she was an intruder and accidentally shot her. He never told them anything.*** That's going to last close to an hour or so. And then finally, you know, finally he says I am done. At that point he is pretty well a suspect at that point, so they place him under arrest. And I will have to cut [the tape] off at that point because ***he invokes his rights,*** so at that point I got to turn it off.
>
> * * *
>
> ***The evidence will show that for a good part of an hour, after repeatedly asking what happened, and he would not tell them.***

Tr. 162-63, 168 (emphasis added).

The prosecutor referred to Mr. Brooks' post-*Miranda* silence in his direct examination of Lieutenant Thomas. The questioning established that after he had been advised of his *Miranda* rights, Mr. Brooks refused to offer his account of the shooting:

Q. Did he, during the interview time period, ever tell you what happened?
A. No, he did not.
Q. Did he ever give you an answer?
A. No.

* * *

Q. Do you know of any law enforcement officers who ever, while being questioned or not being questioned, he ever told what happened?
A. No.

* * *

Q. At any time during the interview did he say it was an accident?
A. No.
Q. At any time during the interview did he say they are fighting over the gun?
A. No.
Q. Did he ever give you any explanation during the interview as to what had actually taken place?

* * *

Q. Prior to any arrest, did he ever tell you what happened?
A. No.

Tr. 536-37, 540, 548.

While Lieutenant Thomas was on the stand, the prosecutor played the video recording of Mr. Brooks' interview. Tr. 549-69; Exh. 64. As previously stated, the recording showed several instances of Lieutenant Thomas and Detective Pruneau

pressing Mr. Brooks to relate his side of the story and Mr. Brooks not answering their questions. *See supra* 4-7. The prosecutor never drew attention to the fact that Mr. Brooks said he "had nothing to hide" and "didn't do nothing at all."

Resuming his examination of Lieutenant Thomas, the prosecutor returned to the subject of Mr. Brooks' failure to talk about the shooting in the interview conducted after he had been read his *Miranda* rights.

Q. Now, prior to his arrest did [Mr. Brooks] ever mention that they had been arguing for twenty to forty-five minutes?
A. No.
Q. Prior to his arrest, did he ever say that he told her to quit?
A. No.
Q. Prior to his arrest, did he ever say he told her not to get up?
A. No.
Q. Prior to his arrest did he ever say she turned the lights on?
A. No.
Q. Prior to his arrest, did he ever say where he got the gun from?
A. No.
Q. Prior to his arrest, did he ever say that Amanda did anything to make or cause him to shoot her?
A. No.
Q. Prior to his arrest, did he ever give you any type of explanation whatsoever as to what happened?
A. No.

Tr. 570-71.

On cross-examination, Lieutenant Thomas testified that Mr. Brooks "basically said nothing" during the interview. Tr. 575-76. In this regard, Lieutenant Thomas' testimony was consistent with his prior testimony as well as the prosecutor's theme that Mr. Brooks "never told them anything." Tr. 163.

Mr. Brooks testified that Ms. Cates pointed a gun at him and threatened to kill him, and that the gun went off when he tried to disarm her. Tr. 629-32.

The prosecutor cross-examined Mr. Brooks about his failure to tell the officers who interviewed him how the shooting occurred:

> Q. [B]asically what they asked you was, we just want to know what happened, give us your side of the story. Is that a fair rendition of what they were asking you?
> A. I believe so.
> Q. All right. And you never told them, did you?
> A. Didn't say anything.

Tr. 719. The prosecutor did not dispute Mr. Brooks' characterization of the interview.

On further cross-examination, the prosecutor reiterated that Mr. Brooks had not told the officers that he acted in self-defense as he had testified in support of his claim of self-defense:

> Q. Terry Thomas and Officer Pruneau, prior to your arrest, asked you what happened, you didn't tell them what you told the jury in your Direct Examination, did you?
> A. That's correct.

Tr. 721.

During closing argument, the prosecutor again commented on Mr. Brooks' failure to cooperate with the police. The prosecutor argued:

> ***[I]f it really happened like he said, he would have been screaming it to the walls.*** He wouldn't have started out for the intruder lie. He wouldn't have kept the intruder lie going. He would have changed it when asked.

Tr. 799 (emphasis added).

The jury found Mr. Brooks guilty of second degree murder and armed criminal action. He was sentenced to life imprisonment and a 75-year term, to be served concurrently.

**B. Appellate Review**

The Missouri Court of Appeals affirmed Mr. Brooks' convictions. Ignoring the fact that the prosecution characterized Mr. Brooks' post-*Miranda* statements as silence and refusals to answer questions, it held that Mr. Brooks waived his right to remain silent by "elect[ing] to respond to questions asked by the interviewing office [sic]." Pet. App. A24.

The Missouri Supreme Court granted Mr. Brooks' transfer application and reversed, holding that the prosecution violated Mr. Brooks' right to due process as established in *Doyle*. The court emphasized that the prosecution claimed at trial that Mr. Brooks' statements that he had "nothing to hide" and "didn't do nothing at all" were non-substantive general denials of culpability that "did not give an account of the struggle or shooting during the interview." Pet. App. A3-A4. The court thus determined that the prosecutor violated *Doyle* by characterizing Mr. Brooks' post-*Miranda* statements as silence and repeatedly commenting on this silence, developing a theme which he repeated in all phases of the trial that "if Brooks was innocent, he would have made an exculpatory statement during the police interview." Pet. App. A14.

## REASONS FOR DENYING THE WRIT

The Missouri Supreme Court correctly held that a defendant is denied due process when, as here, the prosecution characterizes a defendant's generalized post-*Miranda* denials and refusals to answer questions as silence and then urges the jury to draw meaning from that across-the-board silence.

This decision does not conflict with any of those that the State of Missouri cites in which courts have found no due process violation. In those cases, the prosecution characterized the defendant's post-*Miranda* statements as substantive in nature and attacked the inconsistencies between those statements and trial testimony. Although Missouri now asserts that Mr. Brooks' statements were substantive in nature and inconsistent with his trial testimony, it never made that claim at trial. Rather, its position was that Mr. Brooks said "[n]ot a word" and "never told them anything." Tr. 163. After being repeatedly "asked what happened," the prosecution continued, "he would not tell them." Pet. App. 168. Under these circumstances, the Missouri Supreme Court properly focused on the prosecution's actual arguments at trial and held that they constituted a straightforward violation of the Due Process Clause.

### I. The State Mischaracterizes the Record and the Basis for the Missouri Supreme Court's Holding.

Before addressing Missouri's argument, Mr. Brooks is compelled to point out several misstatements of fact contained in the petition. The petitioner's claim that

the Missouri Supreme Court's decision misapplied *Doyle* and conflicts with other cases depends on these factual misstatements.

Missouri has taken liberties with the record to create the impression that Mr. Brooks provided a detailed post-*Miranda* account of the shooting when he clearly did not. The petitioner repeatedly asserts that Mr. Brooks made a lengthy statement about his role in the shooting after being advised of his *Miranda* rights. The petitioner claims that Mr. Brooks:

- stated he "had done 'nothing' in reference to the killing of his fiancée." Pet. i.
- asserted he "had done 'nothing' in relation to the murder of his fiancée." Pet. 3.
- stated he "had 'nothing to hide' about the murder." Pet. 8.
- maintained he "had done 'nothing' in connection with the murder." Pet. 8.
- made "various exculpatory statements about his conduct in killing his fiancée." Pet. 11.
- offered "statements about his role in the murder." Pet. 13.
- stated "he did not know what had happened." Pet. 17.

These assertions are misleading and not supported by the record. After receiving the *Miranda* warnings, Mr. Brooks did not talk about the facts of the case or provide an exculpatory story. During the interrogation, Mr. Brooks was silent

about everything of substance concerning the shooting. He never mentioned a gun, shooting, fight, struggle, argument, or accident.

In representing that Mr. Brooks said he did "nothing" in relation to the shooting and claimed he "did not know what happened," Missouri mischaracterizes the interrogation. After asking the officers interrogating him whether he was under arrest or free to go, Mr. Brooks stated: "I don't have nothing to hide. I didn't do nothing at all." Pet. App. A41. This statement was not in response to a question inquiring into the shooting. Nor did it concern the circumstances of the shooting or contradict Mr. Brooks' testimony that he was not culpable. And, as previously noted, Mr. Brooks did not say he "did not know what happened" during the interrogation as Missouri maintains. *See supra* 4 n.1.

The petitioner also misstates the record when it asserts that the prosecutor "referr[ed] to those [post-*Miranda*] statements during opening statement, in its case-in-chief, in cross-examining Mr. Brooks, and in closing argument" by "pointing out that Mr. Brooks had ultimately told the police nothing of value during the post-*Miranda* interrogation." Pet. 3. While the prosecutor took the position that Mr. Brooks said nothing of substance during the interrogation, the prosecutor never referred to a post-*Miranda* statement that Missouri now claims concerned the shooting.[4] Rather, the prosecutor repeatedly argued that Mr. Brooks said "[n]ot a word" in response to the police's questioning; "He never told them anything"; "[H]e

[4] In opening statement, the prosecutor stated that Mr. Brooks requested a phone book and a telephone number and expressed his desire to talk to somebody. Tr. 163. The prosecutor also stated that Mr. Brooks invoked his *Miranda* rights. *Id.*

[n]ever g[a]ve you an answer;" "[H]e [n]ever g[a]ve you any explanation during the interview as to what had actually taken place"; "[A]fter repeatedly being asked what happened, he would not tell them." Tr. 163, 168, 536, 540. In other words, the prosecutor focused on Mr. Brooks' refusal to talk to the officers interviewing him and disclose the same exculpatory facts he testified to in support of his claim of self-defense.

Finally, Missouri states that "the fact of [Mr. Brooks'] invocation was not presented to the jury." Pet. 17. This is another assertion in conflict with the record. The prosecutor informed the jury in opening statement that the officers read Mr. Brooks his *Miranda* rights and explained that he would have to stop the video recording of the interrogation because Mr. Brooks "invoke[d] his rights." Tr. 162-63.

**II. The Missouri Supreme Court correctly applied *Doyle v. Ohio* and *Anderson v. Charles* in holding that prosecutors may not emphasize a defendant's post-*Miranda* silence to draw an adverse inference of guilt.**

Missouri maintains that because Mr. Brooks did not remain completely silent after being advised of his *Miranda* rights, *Doyle* did not preclude the prosecutor from commenting on and adducing evidence of Mr. Brooks' failure to recount each and every detail of the defense he would offer at his trial a year later. One needs to look no further than *Doyle* and *Charles* to refute Missouri's argument.

Missouri's attempt to justify the prosecutor's use of Mr. Brooks' post-*Miranda* silence is based on a fundamental misunderstanding of *Doyle* and its progeny. In

*Doyle*, a police officer informed Mr. Doyle that he was being arrested for the sale of marijuana and read him the *Miranda* warnings. 426 U.S. at 611. Mr. Doyle made general exculpatory statements denying culpability. He inquired "what's this all about?" and exclaimed "you got to be crazy." *Id.* at 614 n. 5; *Id.* at 622 n.4 (Stevens, J., dissenting). He also asserted that he "didn't know what [the police officer] was talking about." *Id.* at 622 n.4 (Stevens, J., dissenting). Mr. Doyle did not talk about the alleged crime and did not claim he had been framed, the defense he would assert at trial. *Id.* at 613. The Court held that the prosecution violated Mr. Doyle's right to due process when it impeached his "exculpatory story, told for the first time at trial, by cross-examining [him] about his failure to have told the story after receiving *Miranda* warnings." *Id.* at 611, 619-20. In other words, the prosecution violated due process by treating Mr. Doyle's post-*Miranda* statements as "silence" and then asking the jury to draw an adverse inference from that silence. *Id.* at 616, 619.

In *Anderson v. Charles*, the Court clarified that *Doyle* does not prohibit the prosecution from impeaching a defendant based on inconsistencies between his testimony and post-*Miranda* statement. Mr. Charles was arrested while driving a stolen car. *Id.* at 404. The car's owner had been strangled to death less than a week earlier. *Id.* After being advised of his *Miranda* rights, Mr. Charles told a detective that he had stolen the automobile about two miles from the bus station. *Id.* at 405.

At trial, he testified that he stole the automobile from a parking lot next to the bus station, and not two miles away as he had told the detective. *Id.*

Holding that *Doyle* does not bar cross-examination that "merely inquires into prior inconsistent statements," the Court concluded that the prosecutor did not violate Mr. Charles' constitutional rights by cross-examining him about the inconsistency in these statements. *Id.* at 408-09. Specifically, the Court found that the prosecutor did not violate *Doyle* by asking the defendant "why, if [his testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot [as he testified] instead of telling him that he took it from the street." *Id.* at 408-09 (alterations in original). The Court determined that this question was not improper because it was designed "to elicit an explanation for a prior inconsistent statement" and not "to draw meaning from silence." *Id.* at 409.

The Missouri Supreme Court's decision is a straightforward application of *Doyle* and is perfectly consistent with *Charles*. Just like the prosecutor in *Doyle*, the prosecutor here construed Mr. Brooks' post-*Miranda* statements as non-substantive silence and asked the jury "to draw meaning from silence." *Id.* The prosecutor never attempted, as the prosecutor in *Charles* did, "to elicit an explanation for a prior inconsistent statement." *Id.*[5]

---

[5] Missouri's contention that the Court "ignored" Mr. Doyle's post-*Miranda* statements is at odds with *Doyle* and cases construing *Doyle*. In *Doyle*, both the majority and dissent specifically set forth Mr. Doyle's post-*Miranda* statements. If the Court ignored Mr. Doyle's post-*Miranda* statements, why would the Court have bothered to recite them in detail? And in subsequent cases, the Court did not state that Mr. Doyle had remained completely silent as Missouri insists. Rather, the Court emphasized the generality of his post-*Miranda* statements. *See Greer v. Miller*, 483 U.S. 756, 762 (1987) (noting that the *Doyle* defendants "made no postarrest statements about their involvement in

III. The Missouri Supreme Court's holding is consistent with *Doyle's* objectives.

The State argues that the Missouri Supreme Court's decision "divorces *Doyle* from the interests that the rule in *Doyle* is designed to protect" because "Mr. Brooks was not induced to remain silent by the *Miranda* warnings." Pet. 12. "Instead," the State contends, "Mr. Brooks talked at length with the police officers and made various incomplete and misleading statements about his role in the murder." Pet. 13.[6]

The fundamental flaw in Missouri's argument is that the prosecutor never sought to impeach Mr. Brooks with alleged contradictions between his trial testimony and post-*Miranda* statements. Beginning in his opening statement and continuing to the end of trial, the prosecutor emphasized the fact that Mr. Brooks never said anything to the detectives conducting the interrogation. The prosecutor did not ask Lieutenant Thomas or Mr. Brooks (Detective Pruneau did not testify) about anything Mr. Brooks said during the interview. Instead, the prosecutor concentrated on Mr. Brooks' post-*Miranda* silence by inquiring into an array of things Mr. Brooks did not tell the detectives. This fit the prosecutor's overarching

---

the crime"); *Charles*, 447 U.S. at 407 & 407 n.2 (observing that Mr. Doyle's post-*Miranda* statement did not address his "involvement in the crime").

[6] The Missouri Supreme Court's holding is also perfectly consistent with this Court's recent decision in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). In that case, this Court held that statements the defendant makes after being Mirandized are admissible so long as he did not clearly invoke his *Miranda* rights. But here, Mr. Brooks did not argue that the prosecution violated his constitutional rights by introducing statements in which he offered non-substantive generalized denials of culpability. The question is whether the prosecution violated Mr. Brooks' right to due process by arguing that those statements amounted to silence and asking the jury to draw adverse inferences from that silence.

theme that if Mr. Brooks was innocent, he would have talked about the shooting and not refused to cooperate with the police. The prosecutor, therefore, gave the jury the firm impression that Mr. Brooks had an obligation to speak and exhibited consciousness of guilt when he refused to tell his story. In urging the jury to infer guilt from Mr. Brooks' failure to tell the detectives that he acted in self-defense, the prosecutor disobeyed *Charles'* admonition to avoid drawing meaning from silence and improperly sought to penalize Mr. Brooks for remaining silent on this subject.

Missouri has sought to distance itself from its trial strategy on appeal. In proceedings in the state appellate courts, Missouri asserted for the first time that Mr. Brooks actually made post-*Miranda* statements about the shooting which waived his *Doyle* claims. Missouri repeats its new theory here. The doctrine of judicial estoppel, however, bars Missouri from asserting this position on appeal as it is diametrically opposed to the one it urged at trial. *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001).

Missouri also argues that Mr. Brooks' failure to raise self-defense during his interrogation is probative and admissible to attack his credibility because it is "critical information that a person naturally would have been expected to provide." Pet. 18. The Court roundly rejected the same argument in *Doyle* and *Brecht v. Abrahamson*, 507 U.S. 619 (1993), a case Missouri incorrectly states did not involve post-*Miranda* silence. Pet. 18 n.7.

In *Doyle*, the state pleaded "necessity as a justification" for the prosecutor's references to post-*Miranda* silence. 426 U.S. at 616. The state maintained that "the discrepancy between an exculpatory story at trial and silence at time of arrest gives rise to an inference that the story was fabricated somewhere along the way." *Id.* According to the state, "the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue." *Id.* at 617. The Court concluded that the unfairness associated with remarking on a defendant's post-*Miranda* silence outweighed these policy considerations. *Id.* at 617-18.

In *Brecht* the prosecutor cross-examined the petitioner about his post-*Miranda* failure to tell the police the shooting was accidental as he claimed at trial.[7] 507 U.S. at 628-29. The prosecutor's conduct, the Court concluded, violated *Doyle* even though "petitioner had every reason—including to clear his name and preserve

---

[7] In *Brecht* the Court observed:

> The State's cross-examination of petitioner included the following exchange:
>
> "Q. In fact the first time you have ever told this story is when you testified here today is it not?
>
> * * *
>
> "A. You mean the story of what actually happened?
> "Q. Yes.
> "A. I knew what happened, I'm just telling it the way it happened, yes. I didn't have a chance to talk with anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.
>
> Then on re-cross examination, the State further inquired:
>
> "Q. Did you tell anyone about what happened in Alma?
> "A. No I did not."

507 U.S. at 625 n.2 (internal citations omitted).

evidence supporting his version of the events –to offer his account immediately following the shooting" if the shooting had been accidental. *Id.* The prosecutor "crossed the *Doyle* line" by referring "to the petitioner's silence after [he was advised of his *Miranda* rights], or more generally to petitioner's failure to come forward with his version of events at any time before trial." *Id.*[8] In *Brooks*, the prosecutor engaged in the same misconduct when he cross-examined Mr. Brooks regarding his post-*Miranda* failure to volunteer the account of the shooting that he presented to the jury. Tr. 721.

**IV. The Missouri Supreme Court's decision is consistent with decisions of federal circuit courts and state courts of last resort.**

The petitioner contends that the Missouri Supreme Court's decisions conflicts with other lower court decisions in two ways. Neither contention, however, is correct.

First, Missouri cites several cases that it claims "allowed the State to highlight omissions in a defendant's post-*Miranda* statements." Pet. 19. A careful review of these cases reveals that they are distinguishable and not in conflict with the Missouri Supreme Court's decision. In most of the cases, the defendant told the police a detailed post-*Miranda* exculpatory story and contradicted that story in his or her trial testimony. In each of the cases, the prosecution argued that the

---

[8] The Justices unanimously agreed that the prosecution's references to the petitioner's post-*Miranda* failure to claim the shooting was accidental violated *Doyle*. *Brecht*, 507 U.S. at 640 (Stevens, J., concurring) ("Although Members of the Court have disagreed about the seriousness of the due process violation identified in [*Doyle*], in this case we unanimously agree that a constitutional violation occurred . . . .").

defendant made a substantive post-*Miranda* statement concerning the alleged crime, and the prosecution argued that that statement—not silence—had meaning. Because Mr. Brooks did not talk about the shooting during his post-*Miranda* interview and the prosecution asked the jury to draw meaning from Mr. Brooks' silence, these cases are inapposite.

In *State v. Bell*, 931 A.2d 198, 207 (Conn. 2007), the court stated that the defendant was read his *Miranda* rights and "proceeded with the interview." The court did not indicate what the defendant said about the shooting. At the conclusion of the interview, the defendant said "he could provide no further information." *Id.* at 208. Contrary to that representation, the defendant testified that his cousin was present at the scene of the shooting and likely was the shooter, details he had not mentioned in his post-*Miranda* statement. *Id.* The court held that *Doyle* was not violated because the prosecution cross-examined the defendant regarding "selective omissions" from a post-*Miranda* statement which concerned "the subject matter of the crime." *Id.* at 212. It did not urge the jury, as the prosecution did here, to draw meaning from that silence.

In *People v. McReavy*, 462 N.W.2d 1, 4 (Mich. 1990), the defendant agreed to speak to the police and made a series of inculpatory post-*Miranda* statements regarding his involvement in a robbery. He discussed custody issues he was experiencing with his daughter, "a subject the robber had also discussed with his victim." *Id.* When asked about the robbery, the defendant "put his head in his

hands and looked down" and "didn't respond yes or no to those questions." *Id.* When asked "whether he had borrowed the gun used in the robbery from his landlord, the defendant denied that his landlord had loaned him the gun." *Id.* at 5. Next, the officers asked him if he was denying that he committed the robbery, the defendant answered, "no." *Id.* The defendant then said "he did not want to answer any more questions about the robbery." *Id.* He asked the officers to "contact him in the morning" at which time he promised to "clear up the robbery." *Id.* The court held that *Doyle* was not violated because the prosecution argued that the fact that the defendant "answered some questions but not others" showed knowledge of the crime. *Id.* at 5, 8. The prosecution did not characterize the defendant as silent or ascribe significance to any silence.

The other cases Missouri cites follow this same mold. *See United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1287 (9th Cir. 1983) (finding that the prosecutor was not "attempting to draw meaning from silence" because the defendant's post-*Miranda* statement and his trial testimony were "quite different" and the "questioning clearly related specifically to details that defendant offered at trial but failed to reveal at the time of arrest"); *State v. Henry*, 863 P.2d 861, 872 (Ariz. 1993) (prosecution legitimately argued that the defendant's post-*Miranda* statements and trial testimony were "vastly different from one another"); *People v. Osband*, 919 P.2d 640, 694 (Cal. 1996) (there was no error in the prosecutor's "questioning him about his prior inconsistent statements" where defendant denied visiting location of

crime in post-*Miranda* statement and contradicted that assertion at trial); *Wade v. Commonwealth*, 724 S.W.2d 207, 209 (Ky. 1986) (the prosecution cross-examined the defendant about "important matters of substance" that he mentioned in his testimony but had not included in his post-*Miranda* statement; no *Doyle* violation because the defendant made a post-*Miranda* statement "explaining his actions" and the prosecutor limited his cross-examination to the differences between the defendant's post-*Miranda* statement and testimony); *State v. Parker*, 585 N.W.2d 398, 401-02 (Minn. 1998) (no *Doyle* violation because prosecution argued that defendant's post-*Miranda* statements were inconsistent with his trial testimony, not that defendant had refused to answer questions); *State v. Mitchell*, 346 S.E.2d 458, 460-62 (N.C. 1986) (same).

Second, the petitioner argues that the Missouri Supreme Court's decision conflicts with other courts because the Missouri Supreme Court "has apparently adopted a stringent rule requiring that post-*Miranda* statements be expressly contradicted by subsequent trial testimony before such statements can be used by the State in any fashion." Pet. 24. But the Missouri Supreme Court has not adopted a rule that prohibits the admission of a defendant's post-*Miranda* ***statements***. The court held merely when the prosecution characterizes the defendant's post-*Miranda* statements as "[n]ot a word" and "never told them anything" and urges the jury to draw meaning from that silence, the prosecution cannot later defend those

arguments on appeal by claiming that the defendant's statements were actually somehow substantively inconsistent with his trial testimony.

The cases Missouri cites are perfectly consistent with this holding. Those cases conclude that when the prosecution asks the jury to draw meaning from the defendant's silence, the fact that the defendant offered a general denial of guilt in the wake of the *Miranda* warnings does not constitute a waiver of the defendant's *Doyle* claims. *See, e.g., United States v. Caruto*, 532 F.3d 822, 824 (9th Cir. 2008) (finding no waiver where defendant charged with importation and possession of cocaine made post-*Miranda* statement denying knowledge of cocaine in her truck's gas tank); *United States v. Laury*, 985 F.2d 1293, 1299, 1303-04 & n.8 (5th Cir. 1993) (holding that defendant's post-*Miranda* denial of involvement in bank robbery did not authorize prosecutor's reference to defendant's failure to tell the police that he was out of town when the robbery occurred as he testified to at trial in support of alibi defense); *Bass v. Nix*, 909 F.2d 297, 304 & 304 n.11 (8th Cir. 1990) (finding *Doyle* violation even though defendant made post-*Miranda* "general denial of guilt").

In describing the limits the constitution places on the prosecution's use of a defendant's post-*Miranda* silence, the *Bass* court stated:

> The key to the inquiry has always been whether the impeachment was based on post-arrest statements contradicting later trial testimony or whether the impeachment was based on silence contradicting later trial testimony. *Doyle* applies when, as in the instant case, the impeachment was based on silence.

909 F.2d at 304. *See also United States v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993) (stating that the prosecution violates *Doyle* where the "focus of the examination" is "not on inconsistent stories as in *Charles [v. Anderson]*, but on [the defendant's] failure to present his exculpatory story at the time of arrest"); *United States v. May*, 52 F.3d 885, 890 (10th Cir. 1995) (finding no *Doyle* violation where "the focus of the prosecutor's comments was not on May's failure to present his exculpatory story at the time of arrest, but on prior inconsistent stories"); *Laury*, 985 F.2d at 1303 (5th Cir. 1993) (holding that defendant's post-*Miranda* statement denying bank robbery but omitting discussion of his whereabouts when crime occurred was not inconsistent with alibi defense asserted at trial and, therefore, did not permit the prosecutor to comment on the defendant's failure to mention alibi defense to FBI agents). The Missouri Supreme Court's ruling is in harmony with these decisions.

**V. The Missouri Supreme Court's decision does not unfairly hinder the government's ability to prosecute criminal offenses.**

Missouri voices concern that the decision rendered by its highest court will impair its ability to investigate crimes. This fear is unfounded. The court did not, as Missouri contends, hold that the interrogating officer violated *Miranda* and *Doyle* "when he did not stop questioning Mr. Brooks at the moment Mr. Brooks gave evasive and incomplete answers." Pet. 25 (citing Pet. App. A11-A12). What the court found improper was the prosecutor's use and the trial court's admission of

those portions of the video where the officers told Mr. Brooks that he needed to provide an explanation for the shooting and that he would cooperate with them if he was innocent. Pet. App. A11-A12. The court concluded that these "additional comments about Brooks' post-*Miranda* silence" should not have been admitted into evidence. Pet. App. A12.

As the ruling concerned the admissibility of evidence and placed no restrictions on the manner in which law enforcement agents investigate crimes, interrogate suspects, or otherwise perform their duties, Missouri's argument is without merit.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

Joseph F. Yeckel
*Counsel of Record*
Law Office of Joseph F. Yeckel, LLC
116 E. Lockwood Ave.
St. Louis, MO 63119
(314) 227-2430
joe@yeckel-law.com

*Attorney for Respondent*